

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 27, 2009 at Knoxville

JOHNNY L. MCGOWAN, JR. v. STATE OF TENNESSEE

Appeal from the Criminal Court for Rutherford County
Nos. F-51874, F-27457 Don R. Ash, Judge

No. M2009-01124-CCA-R3-HC - Filed November 25, 2009

The petitioner, Johnny L. McGowan, Jr., appeals from the habeas corpus court's denial of his "Motion to Recall and Vacate Partial Habeas Corpus Order Based Upon Newly Established Habeas Law." Because no appeal as of right lies from the denial of such a motion, we dismiss his appeal.

Tenn. R. App. P. 3; Appeal Dismissed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

Johnny L. McGowan, Jr., Mountain City, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; and William Whitesell, District Attorney General, for the appellee, State of Tennessee.

OPINION

On April 3, 2009, the petitioner filed a "Motion to Recall and Vacate Partial Habeas Corpus Order Based Upon Newly Established Habeas Law." The habeas corpus court's order denying the petitioner's motion best explains the procedural history of the case,

The procedural and factual history of this matter is quite complex. In April 1993, in the Criminal Court of Rutherford County, the petitioner pled guilty in Case No. 27110 to three counts of aggravated assault and was sentenced as a Range I, standard offender in each count to concurrent five-year terms in the Department of Correction. On January 24, 1994, he pled guilty in five unrelated cases in the same court and was sentenced as a Range I, standard offender in each case as follows: Case No. 27903, aggravated arson, twenty years; Case No. 27457, six counts of reckless endangerment with a deadly weapon, one year for each

count; Case No. 27905, vandalism over \$500, one year; Case No. 27902, arson, five years; and Case No. 27904, vandalism over \$500, one year. The Court ordered all sentences to be served concurrently.

The motion at issue follows petitioner's original request for habeas relief filed with this Court on December 21, 2001. After several attorney appointments and numerous amendments to the original petition, this Court held a final hearing on April 3, 2003. . . . On April 8, 2003, this Court issued an order partially denying habeas relief. Specifically, the Court found petitioner's plea in Case No. F-27457 void on its face pursuant to Rule 32. Since [the petitioner] was out on bail in Case No. F-27110 during the commission of offenses constituting Case No. F-27457, the sentence imposed in Case No. F-27457 was required to run consecutively to Case No. F-27110. Tenn. R. Crim. P., Rule 32(c)(3)(C). Accordingly, this Court vacated the guilty pleas in Case No. F-27[45]7 and set a new plea date for May 23, 2003. The clerk's current records reflect that the underlying charges in Case No. F-27457 have been dismissed and expunged. Lastly, this Court's order dated April 8, 2003 also denied habeas relief in Case No. 27903 since petitioner was incarcerated at the time of that offense.

The petitioner's motion argued that, because his judgments in Case No. F-27457 were void, the remaining convictions from his "package deal" plea bargain were also void. The habeas court disagreed and denied his motion to recall and vacate on May 1, 2009.

We may not address the merits of the defendant's claim because no Rule 3 appeal lies from the denial of the defendant's "Motion to Recall and Vacate Partial Habeas Corpus Order Based Upon Newly Established Habeas Law." The Tennessee Rules of Appellate Procedure specify the limited circumstances in which a criminal defendant is entitled to an appeal as of right. *See* Tenn. R. App. P. 3(b). The rule provides:

In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and on plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such

issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(b). Although our rules provide a petitioner an appeal as of right from a final judgment in a habeas corpus proceeding, the habeas corpus court's order partially denying habeas corpus relief became final in May 2005. Further, we note that this court has previously stated that "[t]he enactment of . . . the Tennessee Rules of Criminal Procedure abolished the petition to rehear and motion to rehear in . . . criminal cases." *Ricks v. State*, 882 S.W.2d 387, 393 (Tenn. Crim. App. 1994). Because the petitioner has no appeal as of right from the denial of his motion, we dismiss his appeal.

JAMES CURWOOD WITT, JR., JUDGE